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3 **BEFORE THE**  
4 **FEDERAL TRADE COMMISSION**  
5 **WASHINGTON, D.C. 20554**  
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9 Petition of Paul Armbruster for Declaratory  
10 Ruling Regarding a Consumers Right to Revoke  
11 Consent Under the TCPA.  
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13 Rules and Regulations Implementing the  
14 Telephone Consumer Protection Act of 1991  
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CG Docket No. **02-278**

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19 **PETITION FOR DECLATORY RULING OR ALTERNATIVELY A RULEMAKING**  
20 **REGARDING A CONSUMERS ABSOLUTE RIGHT TO REVOKE CONSENT TO**  
21 **RECEIVE UNWANTED TEXT MESSAGES FROM COMMON CARRIERS**  
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23

24 **Paul Armbruster**  
25 **15842 S. 13<sup>th</sup> Pl.**  
26 **Phoenix, AZ, 85048**  
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## I. INTRODUCTION

This petition is about the absolute right of a consumer to revoke consent from receiving unwanted text messages under the Telephone Consumer Protection Act (TCPA) - an entirely distinct concept from the need to obtain prior express consent under the TCPA. Petitioner concedes that under the common carrier exemption, AT&T is exempt from the prior express consent requirements of the TCPA, however, AT&T continues to knowingly conflate these two concepts under the vail of arbitration. They believe the common carrier exemption prevents a consumer from revoking consent – and this is simply incorrect.

Petitioner, Paul Armbruster, has an AT&T cell phone plan. That plan is set up for automatic payments that post to his credit card each month. Once a payment has posted AT&T sends a text message acknowledging payment (they also send a paper invoice with duplicate information). Petitioner does not want to receive these text messages and has tried numerous methods to opt-out. AT&T believes it is not subject to the revocation of consent requirements contained within the TCPA or the FCC regulations and orders because “AT&T[] need(s) to communicate with its customers regarding their accounts...(and because of this) customers are not able to opt-out of receiving certain purely informational texts.” (May 30, 2019 letter from AT&T counsel, Niki Ocku, to Paul Armbruster – Exhibit A).

This position is nonsensical. The FCC’s July 2015 Omnibus Declaratory Ruling and Order could not have been more clear in that "Consumers may revoke consent at any time and through any reasonable means" (p5) and that "without a method for revoking consent, consumers would effectively be locked in at a point where they no longer wish to receive such communication." (¶57 citing the Anda Order). This is the position Petitioner currently finds himself, that is, the

1 acceptance of unwanted text messages is now an implied term of his AT&T contract.

2 The TCPA was first enacted in 1991 as a congressional reaction to the proliferation of  
3 unwanted computerized phone calls to consumers. As Senator Fritz Hollings noted,  
4 “[c]omputerized calls (and now text messages) are the scourge of modern civilization. They wake  
5 us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed;  
6 they hound us until we want to rip the telephone right out of the wall.” 137 Cong. Rec. S16,205  
7 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings). Petitioner does not need nor want text  
8 messages from AT&T informing him that he has paid his bill – he knows that - and refusing to  
9 process opt-out requests is nothing more than a knowingly flagrant indifference to the FCC rules  
10 and AT&T’s obligations under the TCPA.  
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## 13 II. Common Carrier Exemption

14 AT&T’s misguided theory relies on comments made by the FCC in 1992.

15 "Based on the plain language of § 227(b)(1)(iii), we conclude that the TCPA did not intend  
16 to prohibit autodialer or prerecorded message called to cellular customers for which the called  
17 party is not charged. Moreover, neither TCPA nor the legislative history indicates that Congress  
18 intended to impede communications between radio common carriers and their customers regarding  
19 the delivery of customer services by barring calls to cellular subscribers for which the subscriber  
20 is not charged. Accordingly, **cellular carriers need not obtain additional consent** from their  
21 cellular subscribers **prior** to initiating autodialer and artificial and prerecorded message calls for  
22 which the cellular subscriber is not charged."

23 *(In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,*  
24 *7 F.C.C. Rcd. 8752 (1992)) (Emphasis added)*

25 The common carrier exemption exempts the need for AT&T to obtain prior written consent,  
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1 however, the issue at hand is that of “revocation of consent” *not* obtaining “prior express consent.”<sup>1</sup>  
2 AT&T’s theory was rebuked in 2012 when the FCC expressly recognized a consumer’s right to  
3 revoke consent under a common carrier exemption scenario.  
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5 **27. Calls Not Subject to Written Consent Requirement.** While the  
6 Commission adopts rules to protect consumers from unwanted  
7 telemarketing robocalls, it leaves undisturbed the regulatory framework  
8 for certain categories of calls. Specifically, consistent with section  
9 227(b)(2)(C) of the Act and its implementing rules and orders,  
10 the **Commission does not require prior written consent** for  
11 calls made to a wireless customer by his or her wireless carrier if the  
12 customer is not charged. One commenter requests that the Commission  
13 clarify that wireless carriers may send free autodialed or prerecorded  
14 calls, including text messages, without prior written consent, if  
15 the calls are intended to inform wireless customers about new  
16 products that may suit their needs more effectively, **so long as**  
17 **the customer has not expressly opted out of receiving such**  
18 **communications.** As noted above, the Commission addressed this  
19 issue in the 1992 TCPA Order, published at 57 FR 48333,  
20 October 23, 1992, by concluding that Congress did not intend to  
21 prohibit autodialed or prerecorded message calls by a wireless carrier  
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<sup>1</sup> Regardless, AT&T obtains prior express consent via their user agreement.

1 to its customer when the customer is not charged. The Commission  
2 based its conclusion on the fact that neither the TCPA nor its legislative  
3 history indicates that Congress intended to impede communications  
4 between common carriers and their customers regarding the delivery  
5 of customer services by barring calls to wireless consumers for which  
6 the consumer is not charged. Nothing in the record or the Commission's  
7 analysis of consumer complaints provides it a reason to alter its finding.  
8 47 CFR Part 64; CG Docket No. 02-278; FCC 12-21 (Emphasis added)  
9 (<https://docs.fcc.gov/public/attachments/FCC-12-21A1.doc>) at p. 11  
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### 12 **III. The 2015 Omnibus Declaratory Ruling and Order**

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14 If there was ever a time for the FCC to validate AT&T position that consumers cannot  
15 opt-out of messages received from common carriers it would have been in the 2015 Declaratory  
16 Ruling and Order (Order). The FCC did not, instead they devote four pages discussing concepts  
17 entirely consistent with those of the petitioner; for example, they opine; “in light of the TCPA’s  
18 purpose, any silence in the statute as to the right of revocation should be construed in favor of  
19 consumers. We therefore find the most reasonable interpretation of consent is to allow  
20 consumers to revoke consent if they decide they no longer wish to receive voice calls or texts.”  
21 (Citing *Gager v. Dell*, 727 F.3d 265, 270 (3rd Cir. 2013; Order at ¶56). The FCC goes on to  
22 point out, “this gives consent its most appropriate meaning within the consumer-protection goals  
23 of the TCPA. By contrast, an interpretation that would lock consumers into receiving unlimited,  
24 unwanted texts and voice calls is counter to the consumer-protection purposes of the TCPA and  
25 to common-law notions of consent”. (Order at ¶56). The 2015 Order relating to revocation of  
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1 consent is entirely inconsistent with the position of AT&T and their interpretation of the  
2 common carrier exemption.

3 AT&T argument is circular; that is, they believe because they have a prior express  
4 consent exemption this trumps a consumer right to revoke - not so. The FCC was very clear  
5 stating, "Our decision also finds support in the well-established common law right to revoke prior  
6 consent...Congress' omission of a limited form of revocation means that Congress intended for broad  
7 common law concepts of consent and revocation of consent to apply. **Nothing in the language of the**  
8 **TCPA or its legislative history supports the notion that Congress intended to override a consumer's**  
9 **common law right to revoke consent**". (Order at ¶58; emphasis added).

#### 12 **IV. Conclusion**

13 The FCC record is clear; the "common carrier exemption" is an exemption from the need  
14 for cell service providers to obtain **prior express consent** before sending certain text messages.  
15 That exemption does not affect a consumer's right to "revoke consent at any time and through any  
16 reasonable means". (Order at p.5).

#### 18 **Petitioner respectfully requests:**

- 19 • A ruling confirming that a cellular phone customer can revoke consent to receive any and  
20 all unwanted text messages from their cell service provider;
- 21 • An order instructing AT&T to cease sending Petitioner text messages;
- 22 • Referral of this petition to the FCC Enforcement Bureau for further investigation and action  
23 consistent with the consumer protection goals of the TCPA.  
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/s/ Paul Armbruster

**Paul Armbruster**  
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**Phoenix, AZ, 85048**  
**(480) 840-4278**

Date: 9<sup>th</sup> day of July, 2019.

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# EXHIBIT A





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May 30, 2019

Via US Mail and Email

Paul Armbruster  
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Phoenix, Arizona 85048-8666  
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Dear Mr. Armbruster –

This letter is a follow up from our communications pertaining to (1) your request to stop receiving certain text messages from AT&T relating to your AT&T wireless account – telephone number, 480.840.4278; and (2) your inquiry about certain international charges you incurred on your AT&T wireless account.

### **I. Text Messages**

You provided me with text messages sent to you on your AT&T cell phone regarding your data usage and confirmation of your payments on the account. You also stated that you no longer wished to receive these types of text messages. As I have informed you during our telephone conversation, the texts are covered by the wireless carrier exemption, which allows wireless carriers to contact their own customers, regardless of whether the customer has provided express consent or not. See *Warcia v. Subway Restaurants*, 2019 WL 978666, at \*3 (N.D. Ill. Feb. 28, 2019). In 1992, the FCC recognized the wireless carrier exemption in its very first order implementing the Telephone Consumer Protection Act. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 92-90, Report and Order, 7 FCC Red 8752 (1992) (“1992 TCPA Order”), at ¶ 43. The FCC agreed, and concluded that “the TCPA did not intend to prohibit autodialer or prerecorded message calls to cellular customers for which the called party is not charged.” *Id.* at ¶ 45. The FCC explained that this conclusion was “[b]ased on the plain language of 227(b)(1)(iii),” and that that neither the “TCPA nor the legislative history indicates that Congress intended to impede communications between radio common carriers and their customers regarding the delivery of customer services[.]” *Id.*

After the FCC issued its 1992 Order, Congress amended the TCPA to specifically empower the FCC to “exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party ....” See 47 U.S.C. 227(b)(2)(C). And, since then, the FCC has used that authority to continue to re-affirm the wireless carrier exemption. See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-

278, Report and Order, FCC 12-21 (2012), at ¶¶ 10, 27 (“we do not require prior written consent for calls made to a wireless customer by his or her wireless carrier if the customer is not charged”).

More recently, in 2015, Cellular Telecommunications Industry Association (CTIA), contacted the FCC to “highlight[] the continuing importance of the exemption for wireless carriers to call and text their own customers with no charge without prior written consent” and asked the FCC to “confirm that the [FCC’s draft regulations would] not change the existing treatment of calls by wireless carriers to their customers, for which customers are not charged.” Ex Parte Letter from Krista Witanowski, CTIA - The Wireless Association, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02- 278 (filed June 5, 2015), available at: <https://ecfsapi.fcc.gov/file/60001076898.pdf>. In response to CTIA’s request, the FCC again reiterated that “[w]e do not disturb the Commission’s earlier decision that the TCPA’s restrictions do not cover calls from wireless carriers to their customers.” See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, FCC 15-72 (2015) (“2015 TCPA Order”), at ¶ 4, fn. 13.

The texts at issue here fall squarely within the wireless carrier exemption. As explained above, the texts and calls were placed by AT&T, a wireless carrier, to you, an AT&T customer, to provide information about your service (i.e., your data usage and the status of payments on your account). Furthermore, AT&T did not charge you for the texts. The TCPA thus does not apply to the texts you seek to recover for. Additionally, because of AT&T’s need to communicate with its customers regarding their accounts, customers are not able to opt-out of receiving certain purely informational texts like the ones at issue. Finally, you expressly consented to receiving these messages when you accepted AT&T’s Terms and Conditions.

## **2. International Charges**

You indicated that you were charged for two separate international plans when you believe you should have been charged for only one. Specifically, you stated that you traveled to Thailand on February 28, 2019, and began using an AT&T International Day Pass Plan (“IDP”).<sup>1</sup> You further stated that on March 8, you traveled to Cambodia from Thailand. AT&T’s IDP does not provide coverage in Cambodia, thus you signed up for the International Passport Plan<sup>2</sup> (“Passport”) to cover your usage in Cambodia. You stated

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<sup>1</sup> The charges under this plan are \$10 daily, and the plan allows a customer to use data in all IDP countries without roaming charges. Data is drawn from the customer’s domestic plan allowance. Additionally, the customer receives unlimited talk and text.

<sup>2</sup>

The charges under this plan are monthly, and the customer receives unlimited texts, 0.35 per minute for calls and 1 GB data (\$50 per month plus an initial \$10 charge) or 3 GB data (\$120 per month). You signed up for the \$60.00 per month plan.

that later in your trip, you left Cambodia and returned to Thailand (which is also a Passport country), but that instead of your additional usage of your device being charged under the Passport plan, you incurred additional daily IDP charges.

As an initial matter, the terms of IDP expressly state that IDP must be added on a per-device basis before use, and once this option is added, it will stay on your account until you remove it. In this case, you did not remove IDP from your account when you purchased the Passport plan, thus the IDP automatically applied when you returned to an IDP country and you used your phone. This process is generally beneficial to AT&T's customers because the IDP provides for cheaper rates than the Passport plan, including unlimited text and talk, and the ability to draw data from your domestic service plan. In contrast, calls under the Passport plan are 35 cents per minute and each gigabyte of data costs \$50 (or \$120 per month for three gigabytes). If customers were charged under the Passport plan instead of an available IDP, they would therefore frequently end up owing more money.

Here, your invoices show the process described in the IDP's terms was followed. You were charged for IDPs on March 7 and 8 while in Thailand. On March 8, our records show you entered Cambodia, which required purchasing the Passport plan to use your phone. On March 8, you were charged \$60, covering the initial Passport charge and a gigabyte of data. The data records on the invoice indicate you remained in Cambodia through March 13. During that time, you exceed the initial gigabyte of data you had purchased under the Passport plan. This resulted in a charge for a second gigabyte of data (an additional \$50). In March 13-15, you appear to have returned to countries that are covered by the IDP and were charged appropriately. You were thus able to talk and text without incurring additional charges, while using the data on your domestic plan.

Based on the foregoing, we believe the international charges you incurred were appropriate, however, in an effort to resolve this matter, we will offer to refund you \$80.00. This covers the \$50 charge for the second gigabyte of data, as well as the three days of the IDP that were charged after you purchased the Passport plan. Please note that in the future, to the extent you wish to cancel an IDP while traveling, you will need to contact AT&T directly and remove it from your account.

We look forward to your response.

Sincerely,

*Niki Okcu*

Niki Okcu